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No. 06-1456

In the Supreme Court of the United States

HUMBERTO FIDEL REGALADO CUELLAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether proof that petitioner transported cash proceeds of drug trafficking concealed in a hidden and disguised compartment in a car destined for Mexico was sufficient to establish that he transported money in a manner "designed," at least "in part," to "conceal or disguise" either "the nature, the location, the source, the ownership, or the control" of those proceeds, within the meaning of 18 U.S.C. 1956(a)(2)(B)(i).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 9
Conclusion 19

TABLE OF AUTHORITIES

Cases:

Caminetti v. *United States*, 242 U.S. 470 (1917) 13
National Org. for Women, Inc. v. *Scheidler*, 510 U.S. 249 (1964) 13
Pennsylvania Dep't of Corr. v. *Yeskey*, 524 U.S. 206 (1998) 13
United States v. *Abbell*, 271 F.3d 1286 (11th Cir. 2001), cert. denied, 537 U.S. 813 (2002) 11
United States v. *Dimeck*, 24 F.3d 1239 (10th Cir. 1994) 9, 16, 17
United States v. *Esterman*, 324 F.3d 565 (7th Cir. 2003) 13, 14, 15
United States v. *Garcia-Emanuel*, 14 F.3d 1469 (10th Cir. 1994) 16, 17
United States v. *Garcia-Jaimes*, 484 F.3d 1311 (11th Cir. 2007), petition for cert. pending *sub nom. Nunez-Virraizabal* v. *United States*, No. 06-11863 (filed June 11, 2007) 10
United States v. *Gonzalez-Rodriguez*, 966 F.2d 918 (1992) 18

Cases—Continued: Page

United States v. *McGahee*, 257 F.3d 520 (6th Cir. 2001) 13, 15, 16
United States v. *Ness*, 466 F.3d 79 (2d Cir. 2006), petition for cert. pending, No. 06-1604 (filed June 1, 2007) 17, 18
United States v. *Ron Pair Enters., Inc.*, 489 U.S. 235 (1989) 12
United States v. *Sanders*, 929 F.2d 1466 (10th Cir.), cert. denied, 502 U.S. 846 (1991) 13, 14

Statutes:

18 U.S.C. 1956(a)(1)(B)(i) 13, 14
18 U.S.C. 1956(a)(2) 6
18 U.S.C. 1956(a)(2)(B)(i) 1, 6, 9, 10, 11, 13, 14

Miscellaneous:

H.R. Rep. No. 746, 99th Cong., 2d Sess. (1986) 13

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OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. 1a-44a) is reported at 478 F.3d 282. The now-vacated opinion of the panel of the court of appeals (Pet. App. 45a-56a) is reported at 441 F.3d 329.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 2007. The petition for a writ of certiorari was filed on May 3, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of international money laundering, in violation of 18 U.S.C. 1956(a)(2)(B)(i). He was sentenced to 78

months of imprisonment, to be followed by three years of supervised release. Pet. App. 58a-59a. A divided panel of the court of appeals reversed petitioner's conviction and remanded with instructions to enter a judgment of acquittal. *Id.* at 53a. The court of appeals subsequently granted the government's petition for rehearing en banc and affirmed petitioner's conviction. *Id.* at 1a-2a, 7a-16a, 22a.

1. On July 14, 2004, petitioner was traveling south in a Volkswagen Beetle toward Mexico on United States Route 277. Route 277 runs toward Del Rio, Texas, which is directly across the border from Acuna, Mexico. Deputy Kevin Herbert of the Schleicher County Sheriff's office noticed that petitioner's car was traveling very slowly, approximately 40 miles per hour in a 70 mile-per-hour zone. The car also swerved onto the shoulder, leading Deputy Herbert to suspect that the driver might be intoxicated. Noticing that petitioner's car did not have a registration sticker or a license plate, Deputy Herbert decided to stop the vehicle. Petitioner was stopped just south of Eldorado, Texas, about 114 miles from the Mexican border. Pet. App. 2a; Gov't Supp. C.A. Br. on Reh'g 2-3.

Because petitioner spoke no English, Deputy Herbert called State Trooper Danny Nunez to assist him. As they waited for Trooper Nunez to arrive, Deputy Herbert attempted to determine whether petitioner had insurance. Petitioner handed Deputy Herbert some written material from the glove compartment. He then exited the car, without being asked, and went to the front of the car (where the trunk was located) and lifted the lid. As Deputy Herbert looked through the papers petitioner provided, he noticed bus tickets issued in petitioner's name. The tickets showed northbound travel

the previous day, July 13, 2004, from Del Rio, Texas to San Antonio. They also showed a departure the same day at 7:05 p.m. from San Antonio, arriving at 1:20 a.m. the next day (July 14) in Big Spring, Texas. From there, the tickets showed a departure to Lubbock, with a stop in Tulia, ending in Amarillo at 7:00 a.m., and then reversing course. By the time he was stopped in Eldorado that evening, petitioner had travelled nearly 1,000 miles in less than two days' time. Pet. App. 2a-3a; Gov't Supp. C.A. Br. on Reh'g 3. The papers provided to Deputy Herbert also included three Mexican permits to operate a vehicle without license plates. Two were in petitioner's name, dated April 17, 2004, and June 28, 2004. The third, dated May 18, 2004, was in the name of David Rodriguez Aleman. The papers also included a traffic ticket issued to petitioner in Mexico on March 5, 2004. Pet. App. 2a-3a; Gov't Supp. C.A. Br. on Reh'g 4.

Trooper Nunez arrived and began talking with petitioner. Trooper Nunez noticed that petitioner was avoiding eye contact and seemed very nervous. Petitioner stated that he was on a three-day business trip in Texas attempting to buy vehicles, despite the fact that he had no luggage or extra clothing. Petitioner also gave conflicting stories about his travels, saying first that he was coming from Acuna, Mexico, and later that he had been in San Angelo and was on his way to Acuna. He also neglected to mention that he had been in Amarillo. Trooper Nunez noticed a bulge in petitioner's pocket, and, when asked about it, petitioner removed a large roll of cash, mostly in ten- and twenty-dollar denominations, that smelled like marijuana to the officers. Trooper Nunez then requested that a drug search dog come to the scene. Pet. App. 3a; Gov't Supp. C.A. Br. on Reh'g 4-5.

While waiting for the canine unit, Trooper Nunez asked petitioner for permission to search the vehicle, and petitioner consented. The officers started with the trunk that petitioner already had opened. Trooper Nunez noticed drill marks on the fender walls and evidence of tampering on the gas tank—markings that were consistent with attempts to facilitate the transportation of contraband. He also noticed that mud appeared to be splashed purposefully on the car with an acoustic gun, which he knew was often done to cover up tool marks, fresh paint and other work done on a vehicle. In addition, while most of the car's interior was faded and worn, the carpet appeared newer. Trooper Nunez spotted some type of animal hair in the vehicle, concentrated in the rear area, but nowhere else in the car. Petitioner explained the presence of the hair by claiming that he had used the car to transport goats from San Angelo to Mexico on a prior occasion, but Trooper Nunez doubted goats could fit in the space. Pet. App. 3a; Gov't Supp. C.A. Br. on Reh'g 5-6.

Trooper Nunez also found a bag from a fast-food restaurant with a receipt that was dated 5:55 p.m. on the day of the stop. The receipt had a telephone area code that covered Big Spring, Midland, and El Paso, so Trooper Nunez dialed the phone number and determined that the restaurant was located in Big Spring, which is 90 miles northwest of San Angelo—farther north than petitioner told officers he had traveled. Pet. App. 4a; Gov't Supp. C.A. Br. on Reh'g 6.

A border patrol agent called to the scene by Deputy Herbert checked petitioner's last border crossing date, which turned out to be inconsistent with petitioner's version of events. While Trooper Nunez was talking to petitioner and searching the car, Trooper Nunez ob-

served petitioner standing on the side of the road and making the sign of the cross, leading Trooper Nunez to believe that petitioner knew he was in trouble. Pet. App. 4a; Gov't Supp. C.A. Br. on Reh'g 6.

When the canine unit arrived, the trained narcotics-detection dog alerted on the money in petitioner's pocket and on the back floorboard area of the car, indicating the presence of narcotics. The dog handler, Deputy Jason Chatham, then detected a hidden compartment underneath the floorboard; the original floorboard had been cut out and screwed back down with metal screws, though part of it was sticking up. The floorboard was covered with carpet, and two car speakers in wooden boxes were on top of it. Deputy Chatham noticed that animal hair was concentrated in the area of the compartment, and he testified that animal hair is often used to try to distract a dog during a search (but that it does not work). Pet. App. 4a, 46a; Gov't Supp. C.A. Br. on Reh'g 7.

The compartment was found to contain $83,000 in cash wrapped in duct tape bundles inside blue Walmart sacks and marked with a Sharpie as to the amounts in each bundle. The officers discovered a Sharpie in the glove box of the car along with a Phillips-head screwdriver that matched the types of screws used in the hidden compartment. Pet. App. 4a; Gov't Supp. C.A. Br. on Reh'g 7.

The officers arrested petitioner and transported the car to the sheriff's office for further investigation. At the station, petitioner wanted to call his family in Mexico and told Trooper Nunez that if he did not have the car in Mexico by midnight "his family would be floating down

the river."[1] As petitioner was questioned, he gave several different versions of his travels, including the purpose of his trip, where he had been and when, and who owned the vehicle he was driving. Pet. App. 4a-5a; Gov't Supp. C.A. Br. on Reh'g 8.

2. A federal grand jury in the Northern District of Texas issued an indictment charging petitioner with a violation of the "concealment" prong of the international money laundering statute, 18 U.S.C. 1956(a)(2)(B)(i).[2] At trial, the government presented testimony from the officers at the scene of the arrest and from an expert in drug trafficking organizations, who testified about the flow of drugs and money to and from Mexico. Pet. App. 1a-5a. Petitioner testified at his trial, and gave conflicting and inconsistent accounts of the events leading up to his arrest. At the close of all the evidence, petitioner

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[1] At the time petitioner made this statement, he did not know the officers had discovered the cash in the hidden compartment. Pet. App. 4a n.1.

[2] 18 U.S.C. 1956(a)(2) makes it a crime, punishable by up to twenty years' imprisonment, to:

> transport[], transmit[], or transfer[], or attempt[] to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States—
>
> * * * * *
>
> (B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part—
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity.

moved for a judgment of acquittal. The motion was denied, and the jury returned a verdict of guilty. Petitioner's renewed motion for a judgment of acquittal was again denied. *Id.* at 5a-7a.

3. A divided panel of the court of appeals reversed the district court's denial of the motion for judgment of acquittal. Pet. App. 45a-56a. The majority concluded that the government had proved that the money was illegal drug proceeds and that petitioner knew that it was, and that petitioner was attempting to transport the money to Mexico. *Id.* at 49a. But the majority determined that the government failed to prove that petitioner's transportation of the money "was designed in whole or in part to conceal or disguise its nature, location, source, ownership or control and whether [petitioner] knew that." *Id.* at 49a-50a. The majority reasoned: "Taking hidden cash to Mexico is not money laundering unless some further design to conceal can be proved. The statute would prohibit taking drug money to Mexico for the purpose of concealing the fact that it is drug money. The statute does not outlaw concealing drug money from the police for the purpose of taking it to Mexico." *Id.* at 51a. The majority noted that "[i]t is possible, even likely, that the money was destined for some kind of laundering once in Mexico, but the government provided no evidence to indicate such was the case." *Id.* at 52a.

Judge Davis dissented. In his view, the concealment prong of the international money laundering statute was satisfied by the government's proof that petitioner "knowingly concealed the money in the vehicle and intended to deliver the funds to Mexico." Pet. App. 53a.

4. The court of appeals granted the government's petition for rehearing en banc and affirmed petitioner's conviction. Pet. App. 1a-44a. The court concluded that "the government adequately established the concealment prong of the statute, i.e., that [petitioner's] transportation of the funds was designed, in whole or in part, to conceal or disguise the nature, location, source, ownership or control of the proceeds." *Id.* at 10a-11a. The court reasoned that the jury could have found that the circumstances surrounding the transportation of the funds—*i.e.*, bundling them, hiding them in a secret compartment under carpet covered with animal hair—were designed "to conceal or disguise the nature of the cash as drug proceeds," *id.* at 11a, as well as the "location" of those proceeds. *Ibid.* The court further concluded that the evidence permitted the jury to conclude that petitioner's conduct "was designed to conceal or disguise the source, ownership or control" of those funds because the transportation plan allowed the true owner to place the funds in the hands of an intermediary, making it difficult for authorities to determine who "actually owned or controlled the cash." *Id.* at 11a-12a.

The en banc majority rejected petitioner's contention that the money-laundering statute "requires proof that the defendant's acts created the appearance of legitimate wealth." Pet. App. 12a. The court reasoned that, "[a]lthough creating the appearance of legitimate wealth is one way of concealing illicit funds, it is not the only way concealment can be established." *Ibid.* Noting that "Congress chose the broad, unqualified word 'conceal,'" the court observed that "[i]t makes no sense to say that Congress only intended to prohibit concealment that is accomplished in a certain way." *Ibid.*

The court concluded that its decision was supported by cases from other circuits with similar facts. Pet. App. 13a-16a. The court distinguished "on several bases" *United States* v. *Dimeck*, 24 F.3d 1239 (10th Cir. 1994), on which petitioner relied to support his argument that proof of concealment "requires evidence that the defendant attempted to convert dirty money into clean money." Pet. App. 14a.[3]

Three judges dissented. Pet. App. 22a-44a (Smith, J., joined by DeMoss, J.); *id.* at 44a (Dennis, J.). The dissenting judges distinguished between "concealing money to transport it and transporting money to conceal its location," and concluded that only the latter fell within "the definition of money laundering, which is to make money difficult to trace by concealing its illegality." *Id.* at 27a. And they contended that the majority had "create[d] a circuit split" as to whether the money laundering statute requires proof of a design to create the appearance of legitimate wealth. *Id.* at 38a-39a.

ARGUMENT

Petitioner contends (Pet. 5-17) that the court of appeals erred in concluding that the evidence was sufficient to support the jury's finding that petitioner's transportation of the illicit drug proceeds was designed to "conceal or disguise" the nature, location, source, ownership, or control of the proceeds under 18 U.S.C. 1956(a)(2)(B)(i). Specifically, petitioner asserts that the statute requires proof of a design to create the appearance of legitimate wealth, and that the ruling in this case deepens an alleged conflict among the circuits on this

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[3] The court also rejected petitioner's argument (which he does not press in this Court) that the district court erred in permitting the testimony of an expert witness. Pet. App. 16a-22a.

issue. The court of appeals' interpretation of the statute is correct, and there is no conflict in the courts of appeals on this issue. Further review is not warranted.[4]

1. The court of appeals correctly held that the concealment prong of the international money laundering statute, 18 U.S.C. 1956(a)(2)(B)(i), does not require proof of a design to create the appearance of legitimate wealth. That statute makes it a crime for anyone to, among other things, "transport" or "attempt[] to transport * * * funds from a place in the United States to * * * a place outside the United States * * * knowing that such transportation * * * is designed in whole or in part * * * to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." *Ibid.* Here, petitioner transported wrapped bundles of large sums of cash derived from drug dealing concealed in a hidden compartment in his car that was covered with animal hair to hinder its discovery. Under any plain reading of the statutory text, that conduct constitutes a "design[]," at least "in part," to "conceal or disguise" the "nature" of the proceeds (*i.e.*, their association with an illegal enterprise), the "location" of the proceeds (*i.e.*, their physical presence in a secret compartment), and the "source," "ownership" and "control" of the proceeds (*i.e.*, their connection to the true owner). Pet. App. 10a-12a; see *United States* v. *Garcia-Jaimes*, 484 F.3d 1311, 1322 (11th Cir. 2007) (affirming international money laundering convictions based on evidence that the defendants entered into a transportation scheme using car haulers

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[4] A similar issue is presented in *Ness* v. *United States*, petition for cert. pending, No. 06-1604 (filed June 1, 2007), and *Nunez-Virraizabal* v. *United States*, petition for cert. pending, No. 06-11863 (filed June 11, 2007).

to secretly transport illicit drug proceeds from the United States to Mexico), petition for cert. pending *sub nom. Nunez-Virraizabal* v. *United States*, No. 06-11863 (filed June 11, 2007).

Petitioner nonetheless contends that the "conceal or disguise" element of the statute should be construed to require proof that the design to conceal the proceeds was devised for the purpose of creating "the appearance of legitimate wealth." Pet. 7. But even under such a reading of the statute, petitioner could not prevail. Because Mexico has a largely cash-based economy, where United States dollars are as negotiable as Mexican pesos, petitioner's transportation of the money into Mexico would have converted it into useable funds. Gov't Supp. C.A. Br. on Reh'g 12 (citing R. 179-180, 188-189).

In any event, as the court of appeals recognized (Pet. App. 12a), "the text of the statute is not [so] restrictive." *United States* v. *Abbell*, 271 F.3d 1286, 1298 (11th Cir. 2001), cert. denied, 537 U.S. 813 (2002). The statute makes it an offense to transport money for the purpose of concealing or disguising it. See 18 U.S.C. 1956(a)(2)(B)(i). *How* the funds are concealed or disguised—whether by creating the appearance of legitimate wealth, putting the money in the name of a third party, converting the property to another form, or commingling the money with other property—is irrelevant, except to the extent that the particular means chosen is probative of a design (*e.g.*, the more convoluted the transaction, the easier it is to infer a design to conceal or disguise).

Similarly, the statute does not require the government to prove *why* the nature, location, source, or ownership of the proceeds was concealed or disguised. Nothing in the text compels the government to prove

that the nature, location, source, ownership, or control of the property was concealed or disguised in order to create the appearance of legitimate wealth. To the contrary, a criminal may seek to conceal the illicit funds for reasons entirely unrelated to a design to create the appearance of legitimate wealth, such as to evade paying taxes, to prevent seizure and forfeiture of the funds under the asset forfeiture laws, to avoid connecting himself with unlawful conduct or with a criminal confederate, or to forestall a court from ordering him to use the funds to pay restitution to his victims. While the criminal's *ultimate* goal may be to convert illicit funds into usable (apparently legitimate) funds, that process may take several steps. Indeed, rather than concealing or disguising the nature, location, source, ownership, or control of funds to create the appearance of legitimate wealth, a criminal may engage in such conduct in an effort to create the appearance of having no wealth at all. The statutory text reaches all of that conduct.

Thus, as the court of appeals concluded (Pet. App. 12a), while disguising funds for the purpose of creating the appearance of legitimate wealth would establish the concealment element of the statute—and may be a common understanding of what it means to "launder" money—that is hardly the exclusive way to violate the statute. Accordingly, the court of appeals correctly refused to engraft such a requirement onto the statute. See, *e.g.*, *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) ("Where, as here, the statute's language is plain, 'the sole function of the courts is to en-

force it according to its terms.'") (quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917)).[5]

2. Petitioner contends (Pet. 11-16) that the circuits are divided on the question whether Section 1956(a)(2)(B)(i) "requires a design to create the appearance of legitimate wealth." Pet. 11. He contends that decisions from the Sixth, Seventh, and Tenth Circuits require proof of such a design, while three other circuits (the Second, Third, and Eleventh) reject the need for such proof. There is no conflict on this issue warranting this Court's review.

a. The Sixth and Seventh Circuit decisions cited by petitioner address a different issue. See Pet. 11-13 (discussing *United States* v. *Esterman*, 324 F.3d 565 (7th Cir. 2003), and *United States* v. *McGahee*, 257 F.3d 520 (6th Cir. 2001)). Both *Esterman* and *McGahee* involve applications of the holding in *United States* v. *Sanders*,

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[5] Petitioner errs in relying (Pet. 7-9) on the title of the statute, various secondary-source definitions of money laundering, and the legislative history as a basis for reading an element into the statute that its text does not contain. See, *e.g.*, *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212 (1998) (title of a statute cannot limit the plain meaning of the text); *National Org. for Women, Inc.* v. *Scheidler*, 510 U.S. 249, 261 (1994) (legislative history). Moreover, the legislative history cited by petitioner (Pet. 9) for his create-an-appearance-of-legitimate-wealth requirement goes on to indicate that money laundering breaks the chain of evidence (the "paper trail") between a person and certain funds "in order for such person to evade the payment of taxes, avoid prosecution, or obviate any forfeiture of his illegal drug income or assets." *Ibid.* (quoting H.R. Rep. No. 746, 99th Cong., 2d Sess. 16 (1986)). None of those purposes requires more than was done here—attempting to conceal illicitly obtained cash in order to transport it through a courier out of the country. More importantly, none of those purposes (or the creation of the appearance of legitimate wealth) need be proved to violate the statute; instead, the statute reaches conduct that Congress thought would facilitate attainment of those purposes.

929 F.2d 1466 (10th Cir.), cert. denied, 502 U.S. 846 (1991), that a person who merely spends his own money in an open or notorious way, or deposits it into an account in his own name, cannot be guilty of concealment money laundering. *Id.* at 1472. In *Sanders*, the defendant was convicted of concealment money laundering under 18 U.S.C. 1956(a)(1)(B)(i) based on her purchase of two vehicles with drug proceeds. 929 F.2d at 1471.[6] In reversing her conviction, the court of appeals observed that the money laundering statute is not a mere "money spending statute"; rather, its purpose is to reach commercial transactions "intended (at least in part) to disguise the relationship of the item purchased with the person providing the proceeds and that the proceeds used to make the purchase were obtained from illegal activities." *Id.* at 1472.

The issue in cases like *Sanders* is whether the defendant merely spent or invested his money, in contrast to engaging in transactions in order to conceal or disguise the nature, source, or ownership of the funds. *Esterman* and *McGahee* rely on that distinction and not on a principle that concealment must aim at generating an appearance of legitimate wealth. In *Esterman*, the Seventh Circuit concluded that proof that a defendant transferred fraud proceeds to a personal bank account in his own name, and used the money for retail purchases, was not sufficient to show intent to conceal. 324 F.3d at 571. The court reasoned that, to ensure that every movement of illicit proceeds does not become a money laundering offense, there must be "concrete evidence of intent to disguise or conceal" such as state-

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[6] The language of 18 U.S.C. 1956(a)(1)(B)(i) is identical to that in 18 U.S.C. 1956(a)(2)(B)(i) at issue here.

ments by the defendant, unusual secrecy, careful structuring, use of legitimate businesses or third parties, or unusual financial moves. *Id.* at 573.

The court did not hold that creating the appearance of legitimate wealth is necessary to prove a design to disguise or conceal. To the contrary, the court listed several examples of circumstances that would constitute concealment money laundering (as opposed to mere money spending), and only one of those examples would necessarily create such an appearance. See *Esterman*, 324 F.3d at 573 (listing "unusual secrecy surrounding transactions, careful structuring of transactions to avoid attention, folding or otherwise depositing illegal profits into the bank account or receipts of a legitimate business, use of third parties to conceal the real owner, or engaging in unusual financial moves culminating in a transaction").

In *McGahee*, the defendant used a business account to disburse fraudulently obtained proceeds by writing checks to himself, to "cash," and to his mortgage company. 257 F.3d at 526-527. The Sixth Circuit concluded that such conduct was "not intended to conceal how he got the funds, but merely to convert them to liquid assets," *id.* at 528, and further observed that the transactions were not "designed to create the appearance of legitimate wealth." *Ibid.* Rather, the court observed, "the funds were transmitted in a direct, ordinary, and open manner." *Ibid.* The court thus concluded that the defendant's conduct "did not evidence a design to conceal the proceeds of illegal activity." *Ibid.*

While the Sixth Circuit did note that evidence of an intent to create the appearance of legitimate wealth would be one way of establishing an intent to conceal, *McGahee*, 257 F.3d at 528, the court did not suggest

such proof is the only way to do so. Indeed, relying on a decision by the Tenth Circuit, the Sixth Circuit listed examples (very similar to those suggested by the Seventh Circuit in *Esterman*) of various ways the government could prove an intent to conceal. *Id.* at 527-528 (citing *United States* v. *Garcia-Emanuel*, 14 F.3d 1469, 1475-1476 (10th Cir. 1994)).

b. Nor, contrary to petitioner's assertion (Pet. 12-13), does the decision in this case conflict with *United States* v. *Dimeck*, 24 F.3d 1239 (10th Cir. 1994). In *Dimeck*, the defendant was convicted of a conspiracy to commit concealment money laundering based on evidence that he transported drug proceeds in a box and gave them to a co-conspirator, who was then to transport them out of state to give to a drug supplier. *Id.* at 1241, 1242-1243. In reversing, the Tenth Circuit concluded that this evidence was insufficient to prove an effort to conceal or disguise the money being transported. See *id.* at 1247 ("The transportation of the money from Detroit to California in a box, suitcase, or other container does not convert the mere transportation of the money into money laundering."). The *Dimeck* court did state that the "money laundering statute was designed to punish those drug dealers who thereafter take the additional step of attempting to legitimize their proceeds so that observers think their money is derived from legal enterprises," and that it was that step that was missing in *Dimeck*. *Ibid.* But the court did not hold that such proof was the only additional proof that could have satisfied the statute.[7]

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[7] In addition, in describing its earlier decision in *Garcia-Emanuel*, the *Dimeck* court stated that *Garcia-Emanuel* had observed that the statute requires proof of a "desire to create the appearance of legitimate wealth or otherwise to conceal the nature of the funds so that they

Moreover, as the en banc court noted below in distinguishing *Dimeck*, the defendant in that case made only "a minimal attempt at concealment," in contrast to the elaborate concealment of the "nature, the location, the source, the ownership, or the control" of the funds established here. Pet. App. 15a. The degree of concealment is significant because, as the Tenth Circuit itself noted in *Garcia-Emanuel*, 14 F.3d at 1475, "actions that are merely suspicious and do not provide substantial evidence of a design to conceal will not alone support a conviction." Thus, although some *language* in *Dimeck* could be read to preclude prosecutions absent a specific showing that the defendant has "attempt[ed] to legitimize [the] proceeds," 24 F.3d at 1247, the decision itself would not bar prosectuions where, as here, the defendant's actions reveal a design to frustrate any discovery of the cash. The decision in *Dimeck* thus does not conflict with the decision below.[8]

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might enter the economy as legitimate funds." *Dimeck*, 24 F.3d at 1245. But *Garcia-Emanuel* indicated that there were multiple ways the government could prove a design to conceal. See *Garcia-Emanuel*, 14 F.3d at 1475-1476 ("[A] variety of types of evidence have been cited by this and other circuits as supportive of evidence of intent to disguise or conceal. They include, among others, statements by a defendant probative of intent to conceal; unusual secrecy surrounding the transaction; structuring the transaction in a way to avoid attention; depositing illegal profits in the bank account of a legitimate business; highly irregular features of the transaction; using third parties to conceal the real owner; a series of unusual financial moves culminating in the transaction; or expert testimony on practices of criminals.") (footnotes omitted).

[8] Nor, contrary to petitioner's claim (Pet. 11, 14), does the decision of the Second Circuit in *United States* v. *Ness*, 466 F.3d 79 (2006), petition for cert. pending, No. 06-1604 (filed June 1, 2007), evidence a conflict. The Second Circuit stated, without analysis of the facts of *Dimeck*, that that case (and the panel's decision in this case) would

Indeed, on the facts of *Dimeck*, the Fifth Circuit would likely reach the same conclusion as the Tenth Circuit did in *Dimeck*. In reaching its conclusion, the *Dimeck* court relied on an earlier Fifth Circuit decision, *United States* v. *Gonzalez-Rodriguez*, 966 F.2d 918 (1992), that was not overruled by the en banc court here. In *Gonzalez-Rodriguez*, the defendant was stopped by law enforcement officers in the airport and asked if she was carrying any cash; she truthfully responded that she had $8000; she produced it for the officers to count; and she made no false statements to the officers about the money. *Id.* at 920, 925-926. On those facts, the Fifth Circuit held that there was insufficient evidence that her transportation of the money was "designed to conceal or disguise" any of the attributes of the funds listed in the money laundering statute. *Id.* at 925-926.

3. There is no connection between the legal issue before the Court in *United States* v. *Santos*, cert. granted, No. 06-1005 (Apr. 23, 2007), and the issue raised by petitioner. As petitioner notes (Pet. 6), the issue in *Santos* concerns the meaning of the word "proceeds," as used in the money laundering statutes, a dis-

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preclude a concealment prosecution when a defendant merely shipped cash from one place to another, because it read *Dimeck* to require a showing that "the transaction or transportation was designed to give unlawful proceeds the appearance of legitimate wealth." *Ness*, 466 F.3d at 81. But neither the Second Circuit nor the en banc court below would uphold a prosecution based on mere transportation of funds from one drug dealer to another. Rather, as the *Ness* court stated, proof of the design-to-conceal element turns on the "level of secrecy" involved, and it relied in that case on the use of clandestine meetings, coded language, and avoidance of a paper trail. *Ibid.* The court reserved cases where the transfer of funds "is surrounded by less elaborate strategems or a lesser measure of secrecy." *Ibid.* Thus, *Ness* is entirely reconcilable with *Dimeck*, where minimal concealment took place.

crete question of statutory interpretation not presented here. Petitioner did not contend in the lower courts that the funds were not proceeds, and he does not do so now. Insofar as petitioner suggests (Pet. 17) that review of this case should be undertaken along with *Santos*, that suggestion is misguided: unlike *Santos*, where there is a clear, explicit, and intractable conflict among the courts of appeals concerning the meaning of the statutory term "proceeds," here the cases cited by petitioner involve holdings on whether particular facts established a design to conceal or disguise, which is the type of issue on which courts necessarily draw distinctions based on varying circumstances. Despite pointing to language in some opinions linking money laundering to the creation of "the appearance of legitimate wealth," petitioner can identify no inconsistent results or inevitable disagreements on outcomes on the issue he raises.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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